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ARIZONA CORPORATION COMMISSION

November 16, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.; CC Docket No. 02-33, et al.*

Dear Ms. Dortch:

Attached is the Arizona Corporation Commission's Petition for Clarification and/or Reconsideration in the above-captioned matter. It is being electronically filed in each of the dockets listed on the Petition.

Please contact me if you have any questions concerning this matter.

Sincerely,

/s/ Maureen A. Scott

Maureen A. Scott
Attorney, Legal Division
(602) 542-3402

MAS:klc

Attachment

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matters of)	
)	
Appropriate Framework for Broadband)	CC Docket No. 02-33
Access to the Internet over Wireline Facilities)	
)	
Universal Service Obligations of Broadband)	
Providers)	
)	
Review of Regulatory Requirements for)	CC Docket No. 01-337
Incumbent LEC Broadband Telecommunications)	
Services)	
)	
Computer III Further Remand Proceedings; Bell)	
Operating Company Provision of Enhanced)	CC Docket Nos. 95-20, 98-10
Services; 1998 Biennial Regulatory Review –)	
Review of Computer III and ONA Safeguards and)	
Requirements)	
)	
Conditional Petition of the Verizon Telephone)	
Companies for Forbearance Under 47 U.S.C.)	
§ 160(c) with Regard to Broadband Services)	WC Docket No. 04-242
Provided Via Fiber to the Premises; Petition of the)	
Verizon Telephone Companies for Declaratory)	
Ruling or, Alternatively, for Interim Waiver with)	
Regard to Broadband Services Provided Via Fiber)	
to the Premises)	
)	
Consumer Protection in the Broadband Era)	WC Docket No. 05-271

**PETITION OF THE ARIZONA CORPORATION
COMMISSION FOR CLARIFICATION AND/OR
RECONSIDERATION**

I. Introduction

Pursuant to 47 C.F.R. Section 1.106, the Arizona Corporation Commission (“Arizona Commission”) files this Petition for Clarification and/or Reconsideration of the Federal Communications Commission’s (“FCC” or “Commission”) Report and

Order and Notice of Proposed Rulemaking¹ in the above captioned dockets. The FCC's *Wireline Broadband Internet Access Order* was released on September 23, 2005 and published in the Federal Register on October 17, 2005.

The FCC's action was a direct result of the United States Supreme Court's ruling in *Brand X*.² In that case, the Supreme Court affirmed a ruling by the FCC that cable modem service³, the equivalent of wireline Internet access service, was an information service.⁴ The FCC's *Wireline Internet Access Order* applies the Supreme Court's ruling in *Brand X* to wireline broadband Internet access service⁵, and finds that wireline broadband Internet access service is an information service as well.

In its *Order*, the FCC also took the following actions: (1) it eliminated the application of the *Computer Inquiry* rules to wireline Internet access services, (2) it ruled that wireline carriers are permitted to offer broadband Internet access transmission arrangements for wireline broadband Internet access services on a common carrier basis or a non-common carrier basis; (3) it established a one-year transition period whereby

¹ *In the Matter of the Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, CC Docket No. 02-33 et al., Report and Order and Notice of Proposed Rulemaking (Rel. September 23, 2005)(hereinafter referred to as the "*Wireline Broadband Internet Access Order*").

² *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S.Ct. 2688 (2005)("Brand X").

³ "Cable modem service typically includes many and sometimes all of the functions made available through dial-up Internet access service, including content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet, including access to the World Wide Web." See *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities et al.*, GN Docket No. 00-185 et al., Declaratory Ruling and Notice of Proposed Rulemaking (Rel. March 15, 2002)(Hereinafter referred to as the "*Cable Modem Declaratory Ruling*").

⁴ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 & CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

⁵ The FCC defines 'wireline broadband internet access service', as a service that uses existing or future wireline facilities of the telephone network to provide subscribers with Internet access capabilities. *Wireline Broadband Internet Access Order* at para. 9. The FCC defines the term 'Internet access service' as a service that always and necessarily combines computer processing, information provision, and computer interactivity with data transport, enabling end-users to run a variety of applications such as e-mail, and access web pages and newsgroups. Id. Finally, the FCC also notes at para. 9 that "[w]ireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service."

facilities-based wireline Internet access service providers must continue to provide existing wireline broadband Internet access transmission offerings to unaffiliated ISPs; and (4) it found that when broadband transmission is provided to an ISP, it may be classified as a telecommunications service or information service. It also made several other findings relating to the obligations of broadband providers relative to universal service, E-911, disability access and 251 unbundling.

The Arizona Corporation Commission (“Arizona Commission”)⁶ files this Petition for Clarification and/or Reconsideration on the following two narrow points: (1) the classification of DSL when offered and combined with VoIP and (2) the classification of DSL transmission when offered independent of Internet access.

II. Discussion

A. A Combined DSL/VoIP Offering Should be Classified as a Telecommunications Service.

The Commission’s finding that wireline broadband Internet access is an information service appears to be consistent with the *Brand X* decision. In this regard the FCC finds:

The capabilities of wireline broadband Internet access service demonstrate that this service, like cable modem service, provides end users more than pure transmission, ‘between or among points selected by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.’ Because wireline broadband Internet access service inextricably combines the offering of powerful computer capabilities with telecommunications, we conclude that it falls within the class of services identified in the Act as ‘information services’.

Wireline Broadband Internet Access Order at para. 15.

In *Brand X*, (which cited extensively to the FCC’s reasoning contained in its prior Orders and Reports), the critical point was the integrated character of the offering which the Court felt reasonably led the FCC to conclude that cable modem service was not a

⁶ The Arizona Commission did not participate in the underlying proceeding because of limited resources at the time.

“stand-alone,” transparent offering of telecommunications. *Brand X* at p. 2704.

Similarly at paragraph 14 of the *Wireline Broadband Internet Access Service Order*, the FCC stated:

Applying the definitions of ‘information service,’ ‘telecommunications,’ and ‘telecommunications service,’ we conclude that wireline broadband Internet access service provided over a provider’s own facilities is appropriately classified as an information service because its providers offer a single, integrated service (i.e., Internet access) to end users.

In support of its decision affirming the FCC, the Supreme Court at p. 2704 of its opinion (citing para. 39 of the FCC’s Declaratory Order) then looked only at the high speed wire’s use in connection with Internet access and the information processing capabilities that it provides:

Seen from the consumer’s point of view, the Commission concluded, cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities provided by Internet access, and because the transmission is a necessary component of Internet access: ‘As provided to the end user telecommunications it is part and parcel of cable modem service and is integral to its other capabilities.’” (Emphasis added).

As illustrated in the passage cited above, the service and functions the end-user obtained were also critical to both the Court and FCC in determining the ultimate classification of the combined, integrated service. Thus, in the *Cable Modem Declaratory Ruling*, the FCC stated at para. 38: “[c]onsistent with the analysis in the Universal Service Report, we conclude that the classification of cable modem service turns on the nature of the functions that the end-user is offered.”

With Internet access service, the consumer is receiving functions that meet the definition of an “information service”.

That is, like cable modem service (which is usually provided over the provider’s own facilities), wireline broadband Internet access service combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications (e.g., e-mail, web pages, and newsgroups). These applications encompass the capability for ‘generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via

telecommunications,” and taken together constitute an information service as defined by the Act.

Wireline Broadband Internet Access Service Order at para. 14.

With the advent of VoIP, it is no longer true that a consumer will only use the high-speed wire in connection with the information-processing capabilities provided by Internet access. Now, consumers use these same high-speed wires to obtain VoIP which is the functional equivalent of a telecommunications services. VoIP offers the end-user a transparent transmission path without any change in the form or content of the information. Further, the content or form of information conveyed is of the user’s own choosing.

The transparent ability to transmit information was a critical factor in distinguishing between “telecommunications services” and “information services” in the Supreme Court’s discussion at p. 2710 of its *Brand X* Decision (citing the *Stevens Report* at 11539, para. 79):

The service that Internet access providers offer to members of the public is Internet access,’ (cite omitted), not a transparent ability (from the end user’s perspective) to transmit information.

The FCC’s *Order*, however, does not address instances when DSL is combined with VoIP or a telecommunications service. Under the reasoning used in the *Brand X* decision and the various FCC NPRMs, Orders and Reports leading up to *Brand X*, and now under the Commission’s *Wireline Broadband Internet Access Services Order*, since VoIP is the functional equivalent of telecommunications service, the combined service (DSL plus VoIP) should be classified as a telecommunications service. “[T]he statutory definition of ‘telecommunications service’ does not ‘res[t] on the particular types of facilities used,...” *Brand X* at page 2703.

In its underlying *Wireline Broadband Internet Access Services* NPRM⁷, the FCC at para. 19 discussed the distinction between telecommunications and a

⁷ *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, et al., CC Docket No. 02-33 et al., Notice of Proposed Rulemaking (Rel. February 15, 2002).

telecommunications service which also supports classification of DSL combined with VoIP as a ‘telecommunications service’.

Under this definition, an entity provides telecommunications only when it both provides a transparent transmission path and it does not change the form or content of the information. If this offering is made directly to the public for a fee, it is deemed a ‘telecommunications service.’ On the other hand, ‘[w]hen an entity offers subscribers the ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications, it does not provide telecommunications, it is using telecommunications.

Thus, to the extent VoIP is combined with DSL, the combined offering should be classified as a telecommunications service. If the FCC intended to address this issue at a later date, the Arizona Commission seeks clarification of this point. If the FCC intended to address this point through its findings in the *Wireline Broadband Internet Access Services Order*, the Arizona Commission seeks reconsideration.

B. The transmission component when offered on an unbundled basis should be classified as a Telecommunications Service under Title II.

The *Wireline Broadband Internet Access Services Order* appears to give carriers a choice to classify the transmission component when offered separately from Internet access as either an “information service” or a “telecommunications service”. *Id.* at paras. 91-95. The Arizona Commission believes that this is inconsistent with existing case law and that it will be difficult to administer. Either it is a common carrier offering or it is not.

At para. 26 of the underlying *Wireline Broadband Internet Access NPRM* the Commission clearly had concluded that “an entity is providing a ‘telecommunications service’ to the extent that such entity provides only broadband transmission on a stand-alone basis, without a broadband Internet access service.”

In its *Wireline Broadband Internet Access Services Order*, the FCC acknowledges that many wireline broadband services, such as stand-alone ATM services, frame relay, gigabit Ethernet service and other high-capacity special access services that carriers and end-users have traditionally used for basic transmission purposes, should be classified as Title II services. However, it then inexplicably deviates from this treatment for unbundled xDSL. The Arizona Commission does not believe that this deviation in treatment can be justified nor has the FCC provided substantial basis for this deviation in its *Wireline Broadband Internet Access Services Order*.

These transmission services are no different than xDSL when it is unbundled from the Internet access function which is also used as a basic transmission service when offered on a stand-alone basis particularly given that xDSL as a basic transmission service is being increasingly used for VoIP and perhaps other telecommunications services.

The FCC does not have unfettered discretion to confer or not confer common carrier status on a given entity depending the regulatory goals it seeks to achieve. *See National Association of Regulatory Utility Commissioners v FCC*, 525 F.2d 630, 644 (1976)(“NARUC I”) The definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. *Id.* A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so. *Id.*

The primary sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently. This does not mean that the particular services offered must practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users. A second prerequisite to common carrier status is that the system be such that customers transmit intelligence of their own design and choosing. *See Southwestern*

Bell Telephone Company v. FCC, 19 F.3d 1475, 1481 (D.C.Cir. 1994); *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608-09 (D.C.Cir. 1976) (“NARUC II); and *NARUC I*.

A private carrier is much different. The D.C. Circuit Court of Appeals held that whether a provider is a private carrier turns on whether the carrier chooses its clients on an individual basis and determines in each particular case whether and on what terms to serve and there is no specific regulatory compulsion to serve all indifferently. *See Southwestern Bell Telephone Company v. FCC*, 19 F.3d 1475 (D.C.Circuit 1994).

Here there is every indication that DSL providers hold themselves out to serve indifferently those who seek to avail themselves of their particular services, at both the wholesale and retail levels. *See NARUC I* at p. 642. However, even if the service is offered on a common carrier basis, nothing would preclude the carrier from providing service using Individual Case Basis (“ICB”) contracts, where this would meet the business needs of the particular ISP. However, under existing case law, the Arizona Commission does not believe that this alone would act to change the underlying services’ classification unless the prerequisites for private carriage were otherwise met. It is clear on this last point at least, that the FCC expects carriers to continue offer the transmission service to all comers on a nondiscriminatory basis, but in a manner that allows the carrier to meet the business needs of each ISP. *See Order* at paras. 74 and 75. On its face, this appears to be common carriage.

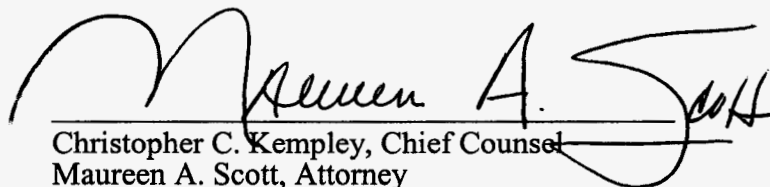
On a related point, at paragraph 95 of the *Order*, the FCC specified that a facilities-based wireline broadband Internet access provider may not simultaneously offer the same type of broadband Internet access transmission on both a common carrier and a non-common carrier basis. Given this statement it is unclear whether the *Order* would preclude the type of offerings referenced in Footnote 170 of the *Order* i.e., where at least one carrier offers DSL transmission service to end users on a common carrier basis, while entering into individually tailored arrangements with ISPs for broadband transmission.

The Arizona Commission believes that nothing under existing law would preclude offering the services on a tariffed basis for retail end-users customers and on an ICB basis for larger end-users, such as ISPs. However, the simple use of an ICB contract would not change the underlying classification of the service offering unless overall the prerequisites for private carriage were met. A carrier cannot vitiate its common carrier status merely by entering into private contractual relationships with its customers. *See Southwestern Bell Telephone Company v. FCC*, 19 F.3d 1475 (D.C.Cir. 1994).

In summary, the Arizona Commission is concerned that the Order appears to give carriers the option to classify their services as either private carriage or common carriage. This may result in misclassification in many instances simply to achieve a particular regulatory result.

The Arizona Commission believes that the transmission component when offered independently of the Internet access function is appropriately classified as a Title II telecommunications service. This is consistent with *Brand X* and the Commission's finding that the transmission portion of Cable Modem Internet Access Service and Wireline Broadband Internet Access Service is "telecommunications". This is also consistent with the FCC's finding in the *Wireline Broadband Internet Access Services Order* that a carrier's 251 unbundling obligations would not be changed as a result of its order.

RESPECTFULLY submitted this 16th day of November, 2005.

A handwritten signature in black ink, appearing to read "Maureen A. Scott", is written over a horizontal line.

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ATTORNEYS FOR THE ARIZONA CORPORATION
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